

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-1203

To be argued by
FREDERICK T. DAVIS

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1203

UNITED STATES OF AMERICA,

Appellee,

—v.—

ELVA MORALES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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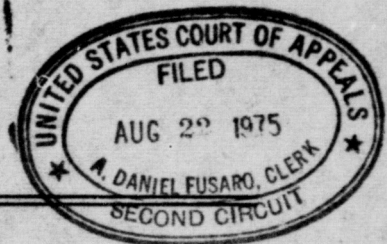


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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Elva Morales appeals from a judgment of conviction entered on May 28, 1975, in the United States District Court for the Southern District of New York after a three-day trial before the Honorable Marvin E. Frankel, United States District Judge, and a jury.

Indictment 74 Cr. 1189 was filed on December 20, 1974 in one count and superseded Indictment 74 Cr. 576, filed on June 6, 1974.* It named only Elva Morales and charged

* Indictment 74 Cr. 576, in five counts, charged 18 defendants, including defendant-appellant Elva Morales, with violations of the federal narcotics laws. Morales was named only in Count One, which charged a conspiracy among all the defendants and others to possess and distribute unknown amounts of narcotic drugs (Appellant's Appendix D). After the filing of that indictment

[Footnote continued on following page]

her with conspiring with others, known and unknown, to distribute and to possess with the intent to distribute Schedule I narcotic drugs, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

Trial of Indictment 74 Cr. 1189 began on March 25, 1975 and ended on March 27, 1975 when the jury returned a verdict of guilty. At the request of Judge Frankel (Tr. 288),* counsel for Morales thereafter moved, on papers, for judgment of acquittal, seeking to set aside the verdict on the ground of insufficient evidence. The motion was denied at the time of sentence (Sent. Tr. 2), and Morales was thereafter sentenced to four years of probation (Sent. Tr. 6).

Statement of Facts

The Government's Case

The Government's case focused on negotiations for the purchase of drugs among the defendant Elva Morales, Lena Gotes (who had originally been named as a co-defendant in Indictment 74 Cr. 576), an undercover agent for the Drug Enforcement Administration ("DEA") named Saverio J. Weidl, and a special employee of the DEA, George Brana.

Lena Gotes, who had pleaded guilty to the original indictment in this case and subsequently agreed to cooperate with the Government (Tr. 21, 41), testified that in February,

ment, Morales moved to sever her case from that of her co-defendants. The Government opposed that motion and it was denied. Subsequently, however, the Government agreed to a severance for Morales and there followed the instant superseding indictment and superseding Indictment 74 Cr. 1093, filed November 20, 1974. The latter named almost all of the defendants other than Morales and charged four of the five counts originally charged in Indictment 74 Cr. 576.

* Citations to "Tr." refer to the official transcript of the trial; and "GX" to Government Exhibit.

1974, a man she knew then as Tito Rodriguez, but whom she subsequently discovered was DEA employee Brana, approached her with several letters of introduction written to her by one Vladimir Banderas, a South American who had previously supplied her with cocaine from Chile. After an initial period of suspicion, she began to trust Brana and discussed the possibility of doing business in narcotics with him (Tr. 23-30). In particular, she told him the names of people who had sent cocaine to her from Chile, including one Carmen Miranda, who, she noted, had been a friend of Elva Morales as well (Tr. 25-26). Brana then disappeared for "a month or two" before he reappeared at the cleaning establishment operated by Gotes (Tr. 30).

During the months Gotes saw and spoke with Brana, Elva Morales, an old friend, occasionally came into her cleaning store to leave off or pick up clothes. On some of those occasions Morales mentioned that "she was either bringing or taking drugs . . ." (Tr. 38). After Brana's return, and at the request of Morales, who had seen Brana in the cleaner's, Gotes introduced Morales to Brana (Tr. 38). Gotes subsequently heard from Morales that while she and Brana had attempted to consummate a narcotics sale, "no business was transacted" because "they had arranged to do it in her home and Tito did not come" (Tr. 39). Morales also mentioned to Gotes that the price Brana was asking was "too high," and Morales told Gotes that she would give Gotes a "present when the business was concluded" for introducing her to Brana (Tr. 39-40).

Gotes, thereafter, had further conversations with Brana, after which Brana left again. Following Brana's departure, Morales called Gotes and said that she had heard that someone had some cocaine and that she supposed it might be "Tito"; she asked Gotes to call her contact with Brana—Special Agent Weidl, who, in an undercover capacity, had accompanied Brana in many of his meetings with Gotes (Tr. 29-30)—to find out if Brana was back (Tr. 40-41).

George Brana testified that beginning in February, 1974, he began negotiations with Lena Gotes posing as a narcotics dealer (Tr. 80). After meeting with her approximately ten times, frequently in the company of Special Agent Weidl, he traveled to Chile, where he remained from the end of February to the beginning of April, 1974 (Tr. 81-82). While in Chile, he met with three people whose names he had received from Gotes, including Carmen Miranda. Miranda and the others in Chile gave Brana about three pounds of cocaine that were to be a "sample" for a later shipment of 20 pounds that Brana would carry to the United States. After his return to New York with the cocaine, Brana contacted Gotes again at her cleaning establishment and told her that he had three pounds of cocaine to sell. Gotes said that the price Brana was asking—\$10,000 per pound—was high, but that she would introduce one of her smaller buyers to him, and instructed him to ask for \$13,000 per pound "so that she would have a gain of \$3,000" (Tr. 83). He later called Gotes from his hotel and was introduced on the phone to a woman whom he subsequently found to be Elva Morales. During the phone conversation, Brana and Morales agreed to meet at the Skyline Motor Inn, where Brana was staying, to discuss business. This conversation was electronically recorded, and a transcript of it was admitted into evidence (GX 3). Later that evening, Morales visited Brana at his hotel room with a younger girl whom Brana did not know (Tr. 89). In the room, Morales asked that the curtains be closed, and then Brana gave her a sample of cocaine, wrapped up in a dollar bill, that had previously been given to him by DEA agents. Morales then asked to see the entire three pounds, and Brana called to Agent Weidl, in another room of the hotel, to bring the drugs to his room. These three packages, introduced into evidence as Government's Exhibits 4, 5, and 6, were shown to Morales, who tested the sample of cocaine by sniffing it. Brana and Morales then discussed other matters, including their common "friend" Carmen Miranda. Eventually, Morales left

the room with the sample, saying that while the price of \$13,000 was high she would try to find a buyer for it (Tr. 98). The conversation at that meeting was recorded by a device hidden in the room, and a transcript of the conversation was received in evidence (Tr. 95; GX 7).

Several days later—on Good Friday—Brana had further conversations by phone with Morales, which were also recorded and introduced into evidence (GX 8 and 9). During these conversations Morales agreed to come again to the Skyline Motor Inn for further discussions; however, she failed to appear, and later stated that she had had difficulty with her car (Tr. 102). Brana saw Morales several more times at Lena Gotes' store and told her that he had already sold the cocaine. They then had one final telephone conversation, also recorded and introduced into evidence, in which Morales asked Brana to bring a pound of cocaine for her in his next shipment from Chile, and in which she stated that it was a "pity" that their earlier deal had not succeeded since she had arranged buyers for the entire three pounds (GX 10).*

The final witnesses for the Government were Special Agent Saverio Weidl and Group Supervisor Carey. Weidl described his first meetings with Lena Gotes when acting in an undercover capacity as a bodyguard for George Brana, and then his meeting with Elva Morales in Brana's room at the Skyline Inn (Tr. 141-169). Gerard Carey, who stated that he was in charge of the investigation of this case testified that he saw Morales arrive and leave from the meeting with Brana and Weidl in the Skyline Inn (Tr. 169-175).

The defense called no witnesses.

* The exact statement of Ms. Morales as it appears in the transcript was, "It's a pity . . . because I had the money for the encyclopedia there, all of it" (GX 10, p. 2). Brana explained that in his meeting with Morales at the Skyline Inn they agreed to refer to the pounds of cocaine as "books" (Tr. 90; see also GX 7).

ARGUMENT

POINT I

The indictment was more than sufficiently precise to allow the defendant to prepare a defense, and there was no constructive amendment of it at trial.

Morales contends that the indictment was so insufficiently particular that it deprived her of adequate notice of the charges against her, and further that the Government constructively amended the indictment during trial. These contentions were fully aired before the District Court during trial and properly rejected. They have no merit on appeal.

The first of the two aspects of this argument—that Indictment 74 Cr. 1189 was “so lacking in specificity as to be fatally defective”—is simply foreclosed by numerous decisions of this and other courts.* The indictment here alleged briefly and simply in paragraphs one and two that Morales, during a specified period of time, conspired with others, to the grand jury known and unknown, to violate the federal narcotics laws; and further that it was part of this conspiracy that Morales was to distribute and possess with the intent to distribute narcotic drugs. The in-

* The offhand statement in Morales’ brief, at p. 7, that the initial indictment in this case also was insufficiently particular is not only irrelevant but grossly inaccurate. Indictment 74 Cr. 576, included in Appellant’s Appendix, sets forth in Count One a conspiracy charge measuring six full pages in length, including separately grouped paragraphs identifying the defendants, their roles in the conspiracy, the means by which the conspiracy took place, and 22 different overt acts naming each of the defendants. A more complete and compendious conspiracy charge, offering a virtual road map of the prospective trial of that charge and of much of the evidence to be introduced in support of it, could hardly be imagined.

dictment then alleged three separate overt acts that covered the nub of the Government's proof at trial, that is, the initial introduction of Morales to Brana; the meeting in the Skyline Inn; and the negotiations to purchase three pounds of cocaine.

It is clear under the decisions of this and other Circuits that this indictment exceeded the minimum requirements of specificity and particularity. As this Court held in *United States v. Messina*, 481 F.2d 878, 880 (2d Cir.), *cert. denied*, 414 U.S. 974 (1973), an indictment alleging a conspiracy need only identify the offense with which the defendant has been charged; it need not state within its four corners all the elements of the substantive crime or allege the exact means by which the crime was to be accomplished. See also *United States v. Weiss*, 491 F.2d 460, 466 (2d Cir. 1974). This Court also has held with respect to the predecessor of the statute that formed the basis of the indictment in this case that language tracking the language of the conspiracy statute, 21 U.S.C. § 846, and giving the approximate time and place is sufficient. *United States v. Salazar*, 485 F.2d 1272, 1277 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974). See also *United States v. Sperling*, 506 F.2d 1323, 1344 (2d Cir. 1974); *United States v. Cohen*, — F.2d —, Dkt. No. 74-2026 (2d Cir., June 26, 1975), slip op. 4405, 4415. Furthermore, the challenged indictment's allegations are sufficiently precise to enable Morales to plead her conviction in bar of any future prosecutions for the same offense. See *Hamling v. United States*, 418 U.S. 87, 117 (1974); *United States v. Mallah*, 503 F.2d 971, 985-987 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3575 (March 19, 1975).

None of the decisions relied on by *Morales* provides support for any contrary finding. In *Russell v. United States*, 369 U.S. 749 (1962), which was relied upon in *Hamling v. United States*, 418 U.S. 87, 118 (1974), the defendant was charged with refusing to answer questions

of a Congressional committee which allegedly "were pertinent to the question then under inquiry" by that committee. 2 U.S.C. § 192. Although the indictment faithfully recited the statutory language of 2 U.S.C. § 192, it failed to specify the subject which the committee had had under inquiry. Since to convict under Section 192 the Government was required to prove that the defendant had been asked, and refused to answer, questions pertinent to the subject under inquiry by the committee, the Court held that the failure to allege the nature of that inquiry rendered the indictment insufficient. *Gaither v. United States*, 413 F.2d 1061, 1071 (D.C. Cir. 1969), is similarly inapposite to the determination of the present issue. In that case there was a question as to whether the entire grand jury had or would have voted the indictment before the court since only the foreman of the grand jury had seen the indictment in its final form before he signed it.

Finally, the question of whether Morales had been sufficiently apprised of the charges against her was aired in argument before the District Court and was rejected there. In particular, the Court noted that Morales had never moved for a bill of particulars or for further discovery with respect to the superseding indictment, in spite of the three months between the filing of Indictment 74 Cr. 1189 and the beginning of trial; that Morales had, for whatever use she wished to make of it, ~~discovery~~ material that had been given with respect to the earlier indictment; and finally, that defense counsel had, as he admitted (Tr. 184), access to the minutes of the trial of other defendants named in the original Indictment 74 Cr. 576, in which much of the evidence was the same as that introduced at the trial here. The Court concluded by noting, "But it is perfectly clear to you, I believe, as it is to me, that primarily the Government is claiming that your client conspired with Lena Gotes, and that's what the case is about, to arrange to have her possess cocaine with intent to distribute it. I don't find

that a very cloudy or difficult or obscure theory and the more you try to obscure it, the clearer it seems to me" (Tr. 185-186). Given the completeness of the charge in the indictment, the access of Morales to much of the evidence that was introduced at trial, and the failure of defense counsel to move for any further discovery with respect to the superseding indictment, the first aspect of Morales' claim is clearly without merit.

The second aspect to Morales' first point, that the Government changed its theory of the case before and during the trial and thus somehow amended the indictment, is likewise meritless. Indeed, this claim rests upon a hodge-podge of irrelevancies, misconceptions, and facts that suggest inadequacies in the preparation of a defense rather than changes in the Government's theory. For example, as an initial instance of the confusion allegedly caused by the Government's changing view of the case, Morales cites the first indictment in the case and a memorandum of law filed by the Government with respect to that indictment and prior to the filing of the superseding indictment. At best, this history is utterly irrelevant to a consideration of a sufficiency of the new and separate indictment upon which Morales was tried and the Government's performance at the trial on that indictment. Indeed, the two indictments are not inconsistent, and a comparison of the two reveals the clear fact that Morales—who was named in one overt act in the first indictment—played a small but concrete role in the overall conspiracy charged in the first indictment, a role that was the focus of the second indictment, in which she alone was named.

Further, Morales purports to derive from the trial record her view that the Government paraded through a succession of inconsistent theories of the conspiracy with which she was charged. The claim reflects a misreading of that record. The Government contended at trial, both in its opening (Tr. 13, 19) and in argument to the Court (Tr. 110-117,

178-200) that while the essential conspiratorial relationship it was prepared to prove was between Lena Gotes and Elva Morales, there were others whose identities were not established, such as the woman who accompanied Morales to the meeting at the Skyline Inn and the customers she told Gotes and Brana she had rounded up for the three pounds, whom the jury could find were also co-conspirators * (Tr. 110). At the close of evidence, the Court ruled that the Government had adduced insufficient evidence to allow the jury to find that anyone other than Lena Gotes was a co-conspirator of Elva Morales (Tr. 193-194), and only this conspiratorial relationship was presented to the jury in final arguments and in the charge of the court (Tr. 264).

It is thus abundantly clear that rather than shifting from theory to theory during the course of the trial, as Morales now claims, the Government presented at all times a wholly consistent theory of a core, inner conspiracy between Morales and Gotes, in which others may also have joined.** The alleged conspiratorial relationship that the District Court submitted to the jury for its determination was wholly consistent with both the indictment and with

* The failure to adduce proof of the identity of these individuals did not in itself preclude a finding that they were co-conspirators. The Supreme Court has explicitly held that "one person can be convicted of conspiring with persons whose names are unknown." *Rogers v. United States*, 390 U.S. 367, 375 (1951).

** It is equally clear that the evidence concerning the events in South America and Morales' remarks about her "customers" were admissible in any event. Brana's trip to South America was necessary to explain his possession of the three pounds of cocaine that Morales negotiated to purchase. The testimony concerning the customers was clearly relevant to show Morales' intent to distribute the cocaine, as opposed to mere possession, although this element of the crime could hardly have been doubted from the fact that she expressed an interest in buying three pounds of 94% pure cocaine—perhaps 50,000 doses—and claimed she had found purchasers for it.

the entire tenor of the Government's proof, and Morales' claim that she was somehow surprised is baseless.*

Morales' additional argument, that the Grand Jury that returned her indictment may have intended a theory other than the one upon which she was convicted, is rebutted both by these facts and the settled law of this Court. As the discussion thus far has revealed, the proof introduced by the Government in this case was consistent in every way with the outline of the case presented in the indictment, and it is perfectly clear that there was no variance between the indictment voted by the grand jury and the proof at trial. Furthermore, the fact that the Government offered proof of a somewhat wider, more inclusive conspiracy than that which the District Court ultimately allowed to go to the jury is irrelevant. As this Court held most

* Indeed, counsel for Morales indicated a number of times during the trial that he fully understood the Government's case. At an early point in the trial, during a sidebar conversation about the admissibility of testimony from the first witness, counsel noted that "she [the defendant] is charged with, in this indictment, an involvement in a fairly specific conspiracy involving some fairly specific people," (Tr. 33)—hardly the remark of someone who is utterly confused about the theory of the Government's case. Similarly, while Morales complains in her brief, at p. 12, that the indictment is defective because it does not specifically name Lena Gotes as a conspirator, at trial during argument at the close of the Government's case, the following colloquy took place:

THE COURT: No. I don't think there is anything to the surprise question as far as Elva Morales and Lena Gotes are concerned. I don't think Mr. Concannon really is serious about having ever doubted that Lena Gotes was at least one of the people with whom Elva Morales was accused of being in conspiracy. Am I correct, or not?

MR. CONCANNON: That's correct, your Honor (Tr. 183).

Defense counsel also acknowledged receiving material pursuant to 18 U.S.C. § 3500 several days in advance of trial (GX 12), which could only have further informed him of the Government's theory at trial.

recently in *United States v. Traumunti*, 513 F.2d 1087, 1107-1108 (2d Cir. 1975), if there is sufficient evidence to show the conspiracy charged in the indictment, "the fact there was also evidence adduced of other conspiracies or that the jury could have found two major conspiracies does not require a mandatory charge of acquittal." It follows that since the evidence presented in this case is quite clearly sufficient to sustain the charge in the indictment, see Point II, *infra*, the admission of proof as to other conspiratorial relationships does not require reversal.

POINT II

The evidence was more than sufficient to support the conviction.

Morales contends that the evidence presented to the jury was insufficient to sustain her conviction. The contention was twice considered by the District Court (Tr. 178-200; Sent. Tr. 2) and was properly rejected.

The only conspiratorial agreement whose existence the District Court permitted the jury to determine was that between Lena Gotes and the defendant Elva Morales. The evidence tending to show that those two women had an agreement and understanding that Elva Morales was to possess cocaine with an intent to distribute it was little short of overwhelming. Lena Gotes testified that her role in the narcotics business, for which she pleaded guilty to a charge of criminal conspiracy (Tr. 22), was to "introduce" buyers in New York to sellers bringing cocaine from South America (Tr. 44). In this case, at the request of Morales herself (Tr. 38), Gotes introduced Morales to Brana with the clear intention that it lead to Morales' possession and further sale of narcotics.

Morales does not now appear to question the sufficiency of the showing of this relationship; she argues, rather, that

the agreement between Gotes and Morales was merely that of a seller to a buyer in which there is no joint understanding. This claim misconceives both the facts that the jury had before it and the law.

Preliminarily, the jury had before it evidence showing that the Gotes-Morales relationship did not end with the introduction of Morales to George Brana. Rather, Morales met and discussed her transactions with Gotes several times during the several days she was actively dealing with Brana—facts revealed by the testimony of Gotes (Tr. 39) and the transcripts of the tape recorded conversations between Morales and Brana. Indeed, those transcribed conversations repeatedly evidence the fact that Morales was in constant contact with Gotes during her negotiations with Brana, as for example: "I went yesterday to see my girlfriend, about the books" (GX 8, p. 2); "I've been talking with my girl friend, do you understand? . . . She tells me, no, you must go and see, how it is, how the booklets are . . ." (GX 9, p. 2); and "And you were talking with your friend" (GX 10, p. 1). Indeed, in the final taped conversation between Brana and Elva Morales there occurs an interchange which, while concededly ambivalent, may indicate their agreement that when Brana next sold a pound of cocaine to Elva he would deliver it to Lena Gotes (GX 10, p. 3-4). Finally, when Morales thought that she had come across some cocaine that might have been brought by Brana, she contacted *Lena Gotes* in order to get in touch with Brana (Tr. 40-41, 54). This act on the part of Morales was itself sufficient to show that Morales and Gotes intended to work together in dealing with Brana "for whatever period they continue to deal in this kind of contraband." *United States v. Borelli*, 336 F.2d 376, 384 (2d Cir. 1964), *cert. denied sub nom. Mogarero v. United States*, 379 U.S. 960 (1965).

Moreover, Lena Gotes had the expectation of both a short term and a long term gain from the transaction between Brana and Morales that she had fostered. She was

to receive \$3,000 per pound from Brana for each pound that Elva purchased, and Elva told her that she would give Lena "a present when the business was concluded" (Tr. 39). Furthermore, she had a long-term interest in promoting the continuing flow of cocaine from her sellers in Chile, including Carmen Miranda,* to her "buyers" (Tr. 83) in New York. Her interest in the venture was thus both concrete and direct, and the claim that there was insufficient evidence upon which the jury could convict Morales of conspiring with Lena Gotes is simply frivolous. When viewed in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Tropiano*, 418 F.2d 1069, 1074-75 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970), the evidence was nothing short of overwhelming.**

* It was clear from the evidence at trial not only that Morales and Carmen Miranda were friends (Tr. 25), but also that Morales at least intended to do business with Miranda directly. George Brana testified that Morales told him that Miranda had recently invited Morales to go to Chile, and Morales "thought she would go because she had been invited and she thought she could do some business" (Tr. 92).

** The only Second Circuit cases cited by Morales in this section of her brief, *United States v. Borelli*, supra, and *United States v. zeuli*, 137 F.2d 845 (2d Cir. 1943) do not support her claim that the evidence in this case was insufficient to support the verdict. In *Borelli*, Judge Friendly noted that in order to demonstrate a conspiracy, the Government must show an *agreement*, and not just a group of acts, and further implied that an agreement cannot be inferred from a mere buyer-seller relationship "unless some such understanding is evidenced by other conduct which accompanies or supplements the transaction." 336 F.2d at 384. The showing of the almost continuous contact between Gotes and Morales before, during and after the attempted transaction with Brana clearly demonstrated such "other conduct." In *zeuli*, the Court through Judge Learned Hand held simply that Zeuli could not be convicted of conspiring to deal in stolen ration books without a showing that he knew of or participated in the actual theft. Since Morales was dealing directly with the supposed seller of narcotics, there was no lack of proof of her knowledge and intent.

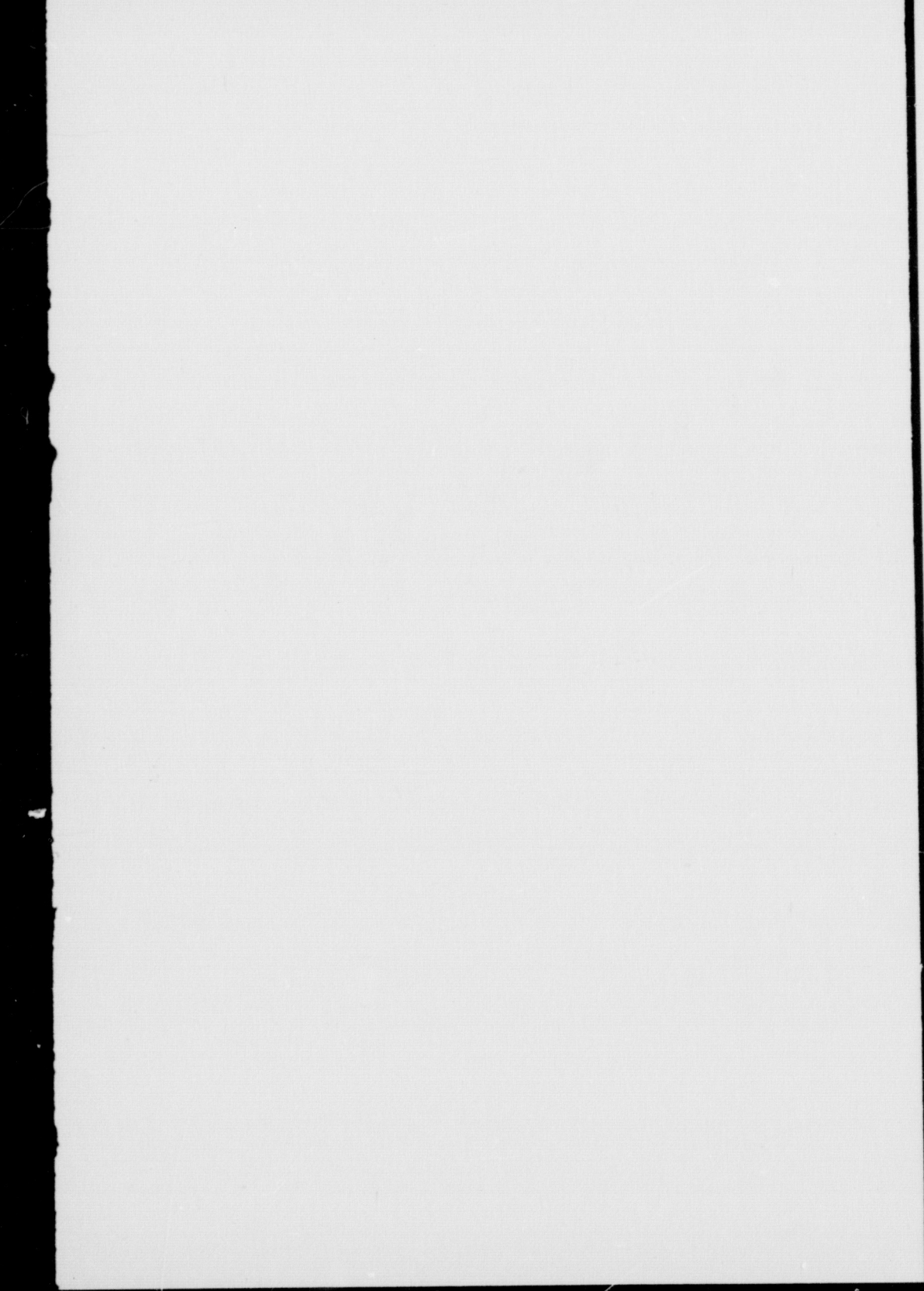
CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Frederick T. Davis being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 22 day of August, 1975
he served 2 copies of the within brief by placing the
same in a properly postpaid franked envelope addressed:

Legal Aid Society
Federal Defenders Unit
15 Park Row
New York N.Y. 10038

Attn: Thomas J. Concannon Esq.

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for mailing
at the United States Courthouse, Foley Square, Borough
of Manhattan, City of New York.

Sworn to before me this

22 day of August, 1975

Manuel A. Morales
COUNTY OF NEW YORK
Registration No. 4521851
COMMISSION EXPIRES 03/30/76.